

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

IN THE MATTER OF:  
Gem Park Old Vermiculite Mine Site  
Fremont County, CO

ADMINISTRATIVE ORDER ON CONSENT  
FOR REMOVAL ACTION

Robert Canterbury and Sandra Canterbury,  
  
Respondents.

U.S. EPA Region 8  
CERCLA Docket No. **CERCLA-08-2004-0012**

Proceeding Under Sections 104, 106(a), 107 and  
122 of the Comprehensive Environmental  
Response, Compensation, and Liability Act, as  
amended, 42 U.S.C. §§ 9604, 9606(a), 9607  
and 9622

## **I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Order on Consent (“Order”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and Robert Canterbury and Sandra Canterbury (“Respondents”). This Order provides for the performance of a portion of a removal action by Respondents on property owned by the Respondents at or in connection with the property located along Fremont County Road 29 in Fremont County, Colorado, the “Gem Park Old Vermiculite Mine Site” or the “Site.”

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended (“CERCLA”).

3. EPA has notified the State of Colorado (the “State”) of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondents recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Order do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Respondents agree to comply with and be bound by the terms of this Order and further agree that they will not contest the basis or validity of this Order or its terms in a proceeding brought by EPA to implement or enforce this Order.

## **II. PARTIES BOUND**

5. This Order applies to and is binding upon EPA and upon Respondents and their heirs, successors and assigns. Any transfer of assets or real or personal property shall not alter such Respondent’s responsibilities under this Order.

6. Respondents are jointly and severally liable for carrying out all activities required of Respondents by this Order. In the event of the insolvency or other failure of any Respondent to implement the applicable requirements of this Order, the remaining Respondent shall complete all such requirements.

7. Respondents shall ensure that their contractors, subcontractors and representatives receive a copy of this Order and comply with this Order. Respondents shall be responsible for any non-compliance with this Order by Respondents, Respondents’ contractors, subcontractors and representatives.

### **III. DEFINITIONS**

8. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Action Memorandum" shall mean the EPA Action Memorandum relating to the Site signed on July 2, 2003, by the Regional Administrator, EPA Region 8, or his delegate, and all attachments thereto. The "Action Memorandum" is attached as Appendix A.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

d. "Effective Date" shall be the effective date of this Order as provided in Section XXVI.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs at or in connection with the Site after the effective date of this Order relating to the presence of amphibole asbestos identified in the Action Memorandum.

g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

i. "Order" shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of conflict between this Order and any appendix, this Order shall control.

j. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

k. "Parties" shall mean EPA and Respondents.

l. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through the effective date of this Order, plus Interest on all such costs through such date.

m. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

n. "Section" shall mean a portion of this Order identified by a Roman numeral.

o. "Site" shall mean the Gem Park Old Vermiculite Mine Superfund Site, located along Fremont County Road 29 in Fremont County, Colorado and depicted generally on the map attached as Appendix B.

p. "State" shall mean the State of Colorado.

q. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and 3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

r. "Work" shall mean all activities Respondents are required to perform under this Order.

#### **IV. FINDINGS OF FACT**

9. The Gem Park Old Vermiculite Mine Site is located along both sides of Fremont County Road 29 in Fremont County, Colorado, approximately five miles east of Hillside, Colorado. The Site's geographic coordinates are 38° 16' 07" north latitude and 105° 32' 46" west longitude.

10. The Site is a former open excavation mine that was mined for vermiculite ore from approximately 1933 through 1950. As a result of the mining operations, mine pits and several piles of mine tailings exist at the Site, as shown on Appendix B to this Order.

11. Respondents Robert Canterbury and Sandra Canterbury own the portion of the Site located southeast of Fremont County Road 29, as further described in Appendix C (the "Property"), including two mine pits, a prospect pit and small piles of tailings. The Canterbury's received the Property by special warranty deed ("Deed") from Beckwith Mountain Ranch L.L.C., a Colorado Limited Liability Company ("BMR") in June, 2001. In the deed, BMR retained the right to approve any development or construction activities on the Property. BMR has given its

consent to allow Respondents and EPA to utilize the Property in accordance with the requirements of this Order.

12. In March, 2002, the Region 8 Superfund Technical Assessment and Response Team (START2) conducted a site reconnaissance. Analytical results of source samples collected during the reconnaissance indicated the presence of amphibole asbestos of the tremolite-actinolite solid solution series at or above trace levels in the waste piles, prospect pit, and along Fremont County Road 29.

13. On June 13, 2002, EPA performed a removal assessment and collected additional samples from the Site. All of the samples from the primary waste pile contained amphibole asbestos at levels above one percent, with the highest result at 15 percent. A sample collected at the prospect pit contained 3 percent amphibole asbestos.

14. On December 12, 2002, EPA took four samples from the small piles surrounding the prospect pit along the southeast side of Fremont County Road 29. The samples contained from trace levels to 60 percent amphibole asbestos.

15. On July 2, 2003, EPA Region 8 issued an Action Memorandum for the Site, recommending that a removal action be performed. The Action Memorandum is attached to this Order as Appendix A and is incorporated herein by this reference.

16. The effects of asbestos are set out in Sections III and IV of the Action Memorandum attached hereto as Appendix A.

17. The potential threat of exposure to asbestos is set forth in Section IV of the Action Memorandum.

## **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

18. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The Gem Park Old Vermiculite Mine Site is a “facility” as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes a “hazardous substance” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Each Respondent is a “person” as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Each Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for performance of response action and for response costs incurred and to be incurred at the Site.

e. Respondents Robert Canterbury and Sandra Canterbury are the “owner(s)” and/or “operator(s)” of a facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

f. The conditions described in the Findings of Fact, above, constitute an actual or threatened “release” of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

g. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

h. The completion of the removal action required by this Order will provide adequate protection of public health, welfare and the environment at the Site from the hazardous substances identified in the Action Memorandum.

## **VI. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Order applicable to Respondents, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order.

## **VII. DESIGNATION OF PROJECT COORDINATOR AND ON-SCENE COORDINATOR**

19. Within five (5) days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all Work by Respondents required by this Order and shall submit to EPA the designated Project Coordinator’s name, address, telephone number, and qualifications. Receipt by Respondents’ Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by all Respondents.

20. EPA has designated John McKeown of the Region 8 Emergency Response Team, as its On-Scene Coordinator (“OSC”). Except as otherwise provided in this Order, Respondents shall direct all submissions required by this Order to the OSC at the U.S. EPA, Region 8 (8EPR-SA), 999 18<sup>th</sup> Street, Suite 300, Denver, CO 80202-2466.

21. EPA and Respondents shall have the right to change their respective designated OSC or Project Coordinator. Respondents shall notify EPA five (5) days before such a change is

made. The initial notification may be made orally, but shall be promptly followed by a written notice.

### **VIII. WORK TO BE PERFORMED/ SITE ACCESS**

22. Commencing on the effective date of this Order and as provided in this Order, Respondents shall provide EPA and its representatives, including contractors ("collectively, "EPA Parties"), access for a period of one year from the Effective Date to the Property for the purpose of conducting the activities described in the July 2, 2003 Action Memorandum (the "Removal Action"). The Removal Action shall include, but is not limited to, EPA Parties performing consolidation of all tailings piles shown on Appendix B to this Order (i.e., "Pile," "Mine Pile A," "Pile B," "Pile C," together with smaller associated tailings piles at the Site) and soils from Fremont County Road 29 that are contaminated with the hazardous substances described in Paragraphs 12 - 14 (such piles and soils to be collectively known as the "Removal Action Materials") into Pit B25, also shown on Appendix B. Pit B25 shall be capped with clean fill material.

a. EPA Parties shall have access to the portions of the Property reasonably necessary for ingress and egress to Pit B25, consolidation of Removal Action Materials from the Property and the Site for placement in Pit B25, and placement of clean fill into B25.

b. EPA Parties shall place only those Removal Action Materials containing hazardous substances identified in Paragraphs 12 - 14 of this Order on the Property and shall place such hazardous substances only within Pit B25. The placement of Removal Action Materials and clean fill into Pit B25 shall not cause the grade of such materials in the Pit to exceed the elevation of the existing grades surrounding Pit B25.

c. EPA Parties shall use reasonable efforts to minimize damages to the Property cause by the Removal Action and agree to reasonably repair any material damages to the Property caused by the action of the EPA Parties during the Removal Action.

d. EPA Parties shall carry out their activities in the Removal Action in accordance with all applicable laws, including the acquisition of all applicable permits or other authorizations needed to carry out and maintain the Removal Action and Pit B25 in the future, and in accordance with a health and safety plan or other plan that prevents the release of hazardous substances onto the Property at locations other than Pit B25 and minimizes the release of dust during the Removal Action.

e. Prior to placement of clean fill at the Site, EPA shall provide documentation of the non-hazardous nature of the fill to the Project Coordinator. EPA shall provide a copy of all final results of sample analyses to the Project Coordinator. Respondents shall be entitled, at their sole cost, to split sample, or sample independently, any of the Removal Action Material prior to or after placement in Pit B25.

f. EPA shall provide Respondents written notice that the Removal Action has been completed.

23. Upon completion of the Removal Action, Respondents shall provide EPA, the State, and Fremont County and their representatives, including contractors, upon reasonable notice, reasonable access to the portions of the Property encompassed by Pit B25 for the purpose of conducting inspections or maintenance of Pit B25.

24. Commencing on the effective date of this Order, Respondents shall refrain from using the portion of Pit B25 containing Removal Action Materials in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the Removal Action. Respondents shall have no responsibility or liability for the continued inspection or maintenance of Pit B25 or any other units created by EPA for management of hazardous substances at the Site. Prior to the completion of the Removal Action, EPA shall designate a party that shall be responsible for the perpetual maintenance of Pit B25.

25. No later than thirty days after the effective date of this Order, Respondents shall submit to EPA for review and approval a deed restriction prohibiting any construction, digging, intrusion, or other action in or on Pit 25 following completion of the Removal Action without prior approval by EPA. Respondents shall execute and record such deed restriction in the Recorder's Office of Fremont County, State of Colorado and provide documentation of its recording to EPA within 30 days after receipt of written approval of the deed restriction by EPA.

26. Respondents shall, at least 30 days prior to the conveyance of any interest in the Property, give written notice to the transferee that the property is subject to this Order and written notice to EPA of the proposed conveyance, including the name and address of the transferee. Respondents also agree to require that their successors comply with the then applicable provisions of Section VIII (Work to be Performed/ Site Access).

27. Notwithstanding any provision of this Order, EPA and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

## **IX. ACCESS TO INFORMATION**

28. Respondents shall provide to EPA and the State, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order. Respondents shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

29. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA and the State under this Order to the extent



permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

30. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide EPA and the State with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

31. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

## **X. RECORD RETENTION**

32. Until five years after the effective date of this Order, Respondents shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in their possession or control or which come into their possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until three years after the effective date of this Order, Respondents shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

33. At the conclusion of this document retention period, Respondents shall notify EPA and the State at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or the State, Respondents shall deliver any such records or documents to EPA or the State. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide EPA or the State with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document,

record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

34. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XI. COMPLIANCE WITH OTHER LAWS**

35. Respondents shall perform all actions required of Respondents pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Order shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (“ARARs”) under federal environmental or state environmental or facility siting laws.

## **XII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

36. In the event Respondents discover any release of a hazardous substance from the Property after the completion of the Removal Action, Respondents shall immediately notify the OSC at 303-312-6831 and the National Response Center at (800) 424-8802. Respondents shall submit a written report to EPA within 7 days after the discovery of each release, setting forth the events that occurred. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

## **XIII. AUTHORITY OF ON-SCENE COORDINATOR**

37. The OSC shall be responsible for overseeing Respondents’ implementation of the Work required by this Order. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Order, and to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

#### **XIV. PAYMENT OF RESPONSE COSTS**

38. Within 30 days after the Effective Date, Respondents shall pay to the EPA Hazardous Substance Superfund \$2,500.00. Payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund" or by wire transfer as specified below. If payment is made by check, the check shall reference the name of the parties making the payment, the Site name (Gem Park Old Vermiculite Mine Site), the EPA Region, the Site # 08FE, and the EPA docket number for this action, and shall be sent to:

Regular Mail: Mellon Bank  
EPA Region 8  
Attn: Superfund Accounting  
Post Office Box 360859  
Pittsburgh, PA 15251-6859

Federal Express,  
Airborne, etc.: Environmental Protection Agency 360859  
Mellon Client Services Center, 1540670  
500 Ross Street  
Pittsburgh, PA 15262-0001

If Respondents choose to wire funds electronically, wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA = 0210300004  
TREAS NYC/CTR/  
BNF=/AC-68011008

At the time of payment, Respondents shall send notice that such payment has been made, along with a copy of the payment, to:

Dawn Tesorero  
Technical Enforcement Program  
U.S. Environmental Protection Agency, 8ENF-RC  
999 18<sup>th</sup> Street, Suite 300  
Denver, CO 80202-2466

39. The total amount to be paid pursuant to Paragraph 38 shall be deposited in the EPA Hazardous Substance Superfund as reimbursement for response costs incurred at or in connection with the Site by the EPA Hazardous Substance Superfund.

40. In the event that the payment required under Paragraph 38 is not made by the due date, Respondents shall pay interest on the unpaid balance. The interest shall begin to accrue on the effective date and shall continue to accrue until the date of payment at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October of each year, in accordance with 42 U.S.C. § 9607(a).

The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Payments of interest made under this paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including , but not limited to, payment of stipulated penalties pursuant to Section XVII.

## **XV. DISPUTE RESOLUTION**

41. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The Parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally.

42. If Respondents object to any EPA action taken pursuant to this Order, they shall notify EPA in writing of their objection(s) within seven days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have 21 days from EPA's receipt of Respondents' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

43. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Order. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Assistant Regional Administrator level or higher will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondents' obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

## **XVI. FORCE MAJEURE**

44. Respondents agree to perform the Work within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondents' best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

45. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondents shall notify EPA orally within forty-eight hours of when Respondents first knew that the event might cause a delay. Within five days thereafter, Respondents shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to

be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

46. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

## **XVII. STIPULATED PENALTIES**

47. For each day, or portion thereof, that Respondents fail to perform, fully, any Work, unless excused under Section XVI (Force Majeure), Respondents shall be liable to EPA for stipulated penalties in the amounts set forth below:

a. For failure to comply with the requirements of paragraphs 22 - 24 and 38 of this Order (access and payment of response costs), stipulated penalties shall accrue in the amount of five hundred dollars (\$500) per day, per violation, for the first fifteen days of noncompliance; one thousand dollars (\$1,000) per day, per violation, for the 16<sup>th</sup> through 30<sup>th</sup> day of noncompliance; and three thousand (\$3,000) per day per violation for all violations lasting beyond 30 days.

b. For failure to comply with the requirements of paragraphs 25 and 26 of this Order (deed restrictions, notifications), stipulated penalties shall accrue in the amount of two hundred fifty dollars (\$250) per day, per violation, for the first fifteen days of noncompliance; five hundred dollars (\$500) per day, per violation, for the 16<sup>th</sup> through 30<sup>th</sup> day of noncompliance; and one thousand (\$1,000) per day per violation for all violations lasting beyond 30 days.

c. For failure to comply with any Work requirement of this Order not listed in paragraphs 47.a. and 47.b. of this Order, above, stipulated penalties shall accrue in the amount of one hundred dollars (\$100) per day, per violation, for the first fifteen days of noncompliance; two hundred dollars (\$200) per day, per violation, for the 16<sup>th</sup> through 30<sup>th</sup> day of noncompliance; and four hundred (\$400) per day per violation for all violations lasting beyond 30 days.

48. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of

the noncompliance or completion of the activity. However, stipulated penalties shall not accrue with respect to a decision by the EPA Management Official at the Assistant Regional Administrator level or higher, under Paragraph 43 of Section XV (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

49. Following EPA's determination that Respondents have failed to comply with a Work requirement of this Order, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

50. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XV (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to Mellon Bank, EPA Region 8, Attn: Superfund Accounting, P.O. Box 360859, Pittsburgh, PA 15251-6859, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number 08FE, the EPA Docket Number , and the name and address of the party(ies) making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 20, and to Dawn Tesorero, U.S. EPA, Region 8, 999 18<sup>th</sup> Street, Suite 300, Denver, CO 80202-2466.

51. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Order.

52. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

53. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 50. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

**XVIII. COVENANT NOT TO SUE BY EPA**

54. In consideration of the Work that will be performed by Respondents under the terms of this Order and the payment that will be made, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondents, Beckwith Mountain Ranch, LLC, its officers, directors, owners or managers, or Paul Seegers and Phyllis Seegers, pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Past and Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondents of all obligations under this Order.

**XIX. RESERVATIONS OF RIGHTS BY EPA**

55. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, except as provided in this Order, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

56. The covenant not to sue set forth in Section XVIII above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondents to conduct any of the Work required in this Order;

b. liability for costs not included within the definitions of Past Response Costs or Future Response Costs;

c. liability for performance of future response actions other than that described in the July 2, 2003 Action Memorandum for the Site;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and

g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

57. The covenant not to sue Beckwith Mountain Ranch, LLC, its officers, directors, owners and managers, and Paul Seegers and Phyllis Seegers, set forth in Section XVIII above, shall be null and void as to any person determined by the United States to be a liable party under section 107(a) of CERCLA, 42 U.S.C. § 6407(a), based upon information not available to the United States as of the effective date of this Order. It is expressly agreed that (a) the deed records reflect that Beckwith Mountain Ranch, LLC and Paul and Phyllis Seegers owned the Property and other land at the Site; and (b) that Beckwith Mountain Ranch, LLC currently owns land in the Site immediately adjacent to the Property upon which some Removal Action Materials may exist.

## **XX. OTHER CLAIMS**

58. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents and Respondents assume no liability for injuries or damages to persons or property resulting from any acts or omissions of the United States or EPA. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order. The Respondents shall not be deemed a party to any contract entered into by the United States or EPA or their employees, agents, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

59. Except as expressly provided in Section XVIII (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

60. No action or decision by EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

61. This Order does not constitute a preauthorization of funds under section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2). Respondents and Beckwith Mountain Ranch, LLC waive any claim to payment under sections 106(b), 111, and 112 of CERCLA, 42 U.S.C. §§ 9606(b), 9611, and 9612, against the United States or the Hazardous Substances Superfund arising out of any action performed under this Order. Respondents and Beckwith Mountain Ranch, LLC further waive any claim to compensation from the United States for any taking of property without just compensation arising from the removal activities to be performed pursuant to the July 2, 2003, Action Memorandum.



## **XXI. CONTRIBUTION PROTECTION**

62. The Parties agree that Respondents, Beckwith Mountain Ranch, L.L.C., its officers, directors, owners, and managers, and Paul Seegers and Phyllis Seegers, are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Order. The “matters addressed” in this Order are the Work, Past Response Costs, and Future Response Costs. Nothing in this Order precludes the United States or Respondents from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

## **XXII. INDEMNIFICATION**

63. Respondents shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out the Work pursuant to this Order. In addition, Respondents agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out the Work pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondents in carrying out the Work pursuant to this Order. Neither Respondents nor any such contractor shall be considered an agent of the United States.

64. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

65. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

### **XXIII. MODIFICATIONS**

66. The OSC may make modifications to any plan or schedule or Statement of Work in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

67. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

### **XXIV. PUBLIC COMMENT**

68. Final acceptance by EPA of Section XIV (Payment of Response Costs) of this Order shall be subject to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), which requires EPA to publish notice of the proposed settlement in the Federal Register, to provide persons who are not parties to the proposed settlement an opportunity to comment, solely, on the cost recovery component of the settlement, and to consider comments filed in determining whether to consent to the proposed settlement. EPA may withhold consent from, or seek to modify, all or part of Section XIV of this Order if comments disclose facts or considerations that indicate that Section XIV of this Order is inappropriate, improper, or inadequate. Otherwise, Section XIV shall become effective when EPA issues notice to Respondents that public comments received, if any, do not require EPA to modify or withdraw from Section XIV of this Order.

### **XXV. SEVERABILITY/INTEGRATION/APPENDICES**

69. If a court issues an order that invalidates any provision of this Order or finds that Respondents have sufficient cause not to comply with one or more provisions of this Order, Respondents shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

70. This Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order.

### **XXVI. EFFECTIVE DATE**

71. The effective date of this Order shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 68 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Order.

72. The undersigned representative of Respondents certify that it is fully authorized to enter into the terms and conditions of this Order and to bind the parties it represent to this document.

## **XXVII. TERMINATION**

73. Except for the provisions contained in Sections VIII, X, XII, and XVII-XXII, this Order shall terminate and Respondents' responsibilities under this Order shall cease, upon the occurrence of both of the following: (a) the filing of the approved deed restriction described in Paragraph 25 and (b) the expiration of a period of one year from the Effective Date.

IT IS SO AGREED:

FOR RESPONDENTS:

**SIGNED** \_\_\_\_\_  
Sandra Canterbury

Date: 4-8-04\_\_\_\_\_

**SIGNED** \_\_\_\_\_  
Robert Canterbury

Date: 4-8-04\_\_\_\_\_

IT IS SO ORDERED AND AGREED:

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY:

**Marvin Frye for/** \_\_\_\_\_  
Sharon L. Kercher, Director  
Technical Enforcement Program  
Office of Enforcement, Compliance, and  
Environmental Justice

Date: 6-7-04\_\_\_\_\_

**SIGNED** \_\_\_\_\_  
Michael T. Risner, Director  
Legal Enforcement Program  
Office of Enforcement, Compliance, and  
Environmental Justice

Date: 6/4/04\_\_\_\_\_

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE  
REGIONAL HEARING CLERK.**

**THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JUNE 8, 2004.**